

Nos. 12,407 and 12,408

IN THE

United States Court of Appeals  
For the Ninth Circuit

SAMUEL H. FRIEND, et al.,

*Appellants,*

VS.

GRANAT BROS. (a corporation),

*Appellee.*

No. 12,407

GRANAT BROS. (a corporation),

*Appellant,*

VS.

SAMUEL H. FRIEND, et al.,

*Appellees.*

(CONSOLIDATED  
CASES)

HERBERT BROWN, et al.,

*Appellants,*

VS.

GRANAT BROS. (a corporation),

*Appellee.*

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*Appellant,*

VS.

HERBERT BROWN, et al.,

*Appellees.*

REPLY BRIEF ON BEHALF OF APPELLANT,  
GRANAT BROS.

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THE DEFENDANTS' BRIEF UNDER THE TITLE, STATEMENT OF THE CASE, AND ELSEWHERE THROUGHOUT THE BRIEF, DISTORTS THE TRUE FACTS OF THIS CASE IN A SHOCKING MANNER.

Re: "Suggestive" versus "descriptive".

The defendants,\* on page 2 of their brief, attack Finding of Fact No. VIII which was made by the District Court and which states:

" 'Plaintiff's trade-mark "Wed-Lock" is not primarily descriptive of the ring ensembles marketed and sold by plaintiff, but it is used in a suggestive or figurative sense and is a valid registered trade-mark.' "

as not being supported by the evidence.

The District Court made the above finding after hearing a tremendous amount of testimony and reviewing voluminous documentary evidence in this case and it reached the only conclusion it could reach under the law of trade-marks; namely, that the trade-mark "WED LOK" is merely suggestive of a wedding-engagement ring ensemble and not descriptive thereof. Fundamentally, the word "wedlock" is commonly used to describe a state of matrimony, and when the trade-mark "WED LOK" is employed in connection with a ring ensemble, it suggests to the ordinary person that said ring ensemble relates to weddings or wedding rings. The trade-mark "WED LOK", as viewed by anyone who purchases such a

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\*In appellant's opening brief the parties were designated in the customary manner of appellant and appellees. However, appellees in their reply brief have designated the parties as the plaintiff and defendant and as this brief is an answering brief we will follow this latter procedure.

trade-mark ring, can only have such a suggestive or figurative meaning, as found by the District Court. The facts as presented to the District Court fully support this finding and pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, and the application of that rule in the recent Ninth Circuit case of *Ralph Brodie Co. v. Hydraulic Press Mfg. Co.*, 151 Fed. (2d) 91, the finding of the District Court must stand because said finding is not clearly erroneous or unsupported by the facts.

Re: "Secondary meaning".

Plaintiff, on page 5 of its brief, again misstates the facts where it says, "no showing of secondary meaning was made" with respect to plaintiff's trade-mark "WED LOK".

The District Court in refusing to enter a specific finding of secondary meaning with respect to plaintiff's trade-mark "WED LOK" was in error because the plaintiff presented to the District Court a tremendous amount of evidence establishing secondary meaning. In fact, secondary meaning is fully established by the Court's own findings as follows:

"VI. That plaintiff applied the trade-mark 'Wed-Lok' to finger rings and wedding ensembles and said finger rings and wedding ring ensembles were sold in interstate commerce over the entire United States by plaintiff continuously since at least the year 1936."

"IX. That plaintiff has been the exclusive user of the trade-mark 'Wed-Lok' continuously since at least the year 1936."



“X. That plaintiff made extensive sales of its products trade-marked ‘Wed-Lok’ throughout the entire United States from the year 1934 to date, and such sales in the trade-marked products were in the amount of approximately Three Million Dollars (\$3,000,000.00).”\*

“XI. That plaintiff’s trade-marked products, ‘Wed-Lok’ and the trade-mark ‘Wed-Lok’ have been widely and very extensively advertised throughout the United States from the year 1934 to the present, excluding the war years of 1942, 1943, 1944 and 1945; and such advertising, exclusive of extensive dealer advertising, cost approximately One Hundred Fifty Three Thousand Dollars (\$153,000.00).”

“XII. That in addition to plaintiff’s advertising of trade-mark products ‘Wed-Lok’ plaintiff’s dealers throughout the United States extensively advertised them in local papers.”†

As to evidence upon which those findings were based, the Court is referred to Exhibits Y, Z and AA, which point out the distributors, dealers and territories covered by plaintiff’s “WED LOK” customers.

As to the evidence of the tremendous dollar value of the advertising of “WED LOK” products, the

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\*Exhibit Z discloses that “WED LOK” rings were sold in 212 towns, 37 states and Territory of Hawaii by 615 dealers during period 1934 to 1941, inclusive.

Exhibit AA discloses that “WED LOK” rings were sold in 602 towns, 47 states and Territory of Hawaii and Washington, D. C. by 1069 dealers during year 1947 to August, 1948.

†A summary of the law of secondary meaning is set forth in Appendix A.



Court is referred to Exhibits EEE and FFF (R. 818-819). These exhibits refer solely to the advertising program of plaintiff and exclude the tremendous cost of advertising "WED LOK" rings by the hundreds of "WED LOK" dealers throughout the entire nation. Such a widespread advertising campaign can only result in familiarizing the public with plaintiff's "WED LOK" products and result in the development of a secondary meaning to the trade-mark "WED LOK" from which the public identifies "WED LOK" products as those of plaintiff's and plaintiff's alone.

It is submitted that there was not only more than ample evidence before the District Court to justify a finding of secondary meaning with respect to plaintiff's trade-mark but no evidence to the contrary, and consequently the District Court committed error in not so finding. (See assignment of error by Granat No. 10, page 7 of opening brief.)

**Re: Defendants attempt to distort the record with reference to plaintiff's advertising of "WED LOK".**

On page 6 of defendants' brief an attempt has been made to mislead this Court with reference to the advertising practice of plaintiff in connection with its trade-mark "WED LOK". Although it is distasteful to plaintiff to accuse the defendants of attempting to mislead this Court, the misstatements made by defendants cannot go unchallenged. Defendants stated, on said page 6, that "Granat adduced no records of advertising expenditures \* \* \* indeed, it seems purposefully to have avoided this \* \* \*" Just how the defendants attempt to support this statement by the record

references contained within the statement in the brief is unexplainable because the record references referred to by the defendants prove the opposite.

The first record reference made by the defendants is to the testimony of Mr. Wineroth (R. 183-186) wherein he affirmatively states that during the years 1934 to 1941 Granat Bros. appropriated three percent (3%) of their total sales to advertising the products of Granat Bros., and of this three percent (3%) fifty to sixty percent thereof was spent in advertising "WED LOK" rings, both directly by Granat and through dealers. This dollar amount was arrived at by proof (R. 178-179) of the Granat sales during that period.

The second reference made by defendants in "support" of their charge that no records of advertising and expenditures were submitted to this Court is to the testimony of Mr. Quick (R. 255-257). A review of this testimony by Mr. Quick discloses that compilations of advertising expenses were introduced by said witness and appear in the record as Exhibit EEE, which is reproduced at R. 818; and Exhibit FFF, which is reproduced at R. 819. It is also to be noted that defendants did not question the propriety of this evidence because they declined to cross-examine Mr. Quick. These two Exhibits, EEE and FFF, disclose that Granat Bros. spent thousands and thousands of dollars in advertising "WED LOK" products from 1943 to July of 1948.

**Re: Distortion of the record as to "notice of infringement to customers".**

Again on page 4 of their brief, defendants state that *they had about two hundred (200) distributors for their rings.\** In the very next breath the defendants inferentially charge plaintiff *with notifying all users of the trade-mark "Lock"* with trade-mark infringement and unfair competition. *This is utterly false* for the fact is, and the record discloses, that in all, only twelve (12) notices of infringement were sent including those to defendant, Feature Ring Co., Inc.'s customers (R. 299-308 and R. 361). It must be remembered, in this respect, that a number of these twelve (12) notices were sent to persons who were not employing the mark "FEATURE LOCK" but were using other marks "hatched" from "FEATURE LOCK", such as "TRU-LOCK", "INVISIBLE LOCK", "ETERNA LOCK", "KIN-LOCK" and "MAGNOLIA LOCK". Thus, by the process of simple subtraction, not more than seven (7) customers using the trade-mark "FEATURE LOCK" of the Feature Ring Co., Inc. were notified of trade-mark infringement. *Suits were filed against three of said customers immediately after such notification.*

**Re: Distortion of record as to the widespread use of "WED LOK".**

Defendants again misstate the facts on page 19 of their brief when they attempt to have this Court believe that the trade-mark "WED LOK" was used

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\*All emphasis ours unless otherwise noted.

only to a small degree, and then spasmodically. The record discloses that there was no discontinuance of the use of the trade-mark "WED LOK" even during the war years (R. 252 to R. 254) (Exhibit DDD) and the District Court so found.\* The witness, Quick (R. 252-253), established by documentary evidence (Exhibit DDD) that "WED LOK" rings were sold during the years 1941, 1942, 1943, 1944, 1945 and 1946. These rings were all stamped with the trade-mark "WED LOK" (R. 152).

**Re: Distortion of record as to defendant Bloch's statement admitting he anticipated confusion of conflict between "WED LOK" and "FEATURE LOCK".**

The statement contained on page 30 of defendants' brief with respect to Mr. Bloch's testimony of anticipated litigation having been made in connection to a letter he, Bloch, had received from a customer is absolutely false. The statement in the brief is:

"Mr. Bloch's statement that he anticipated litigation was made with relation to a letter he had received from a customer stating, 'we are afraid to advertise it ("Feature Lock") because of the suit Granat instituted against you and another

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**\*Finding VI.**

"That plaintiff applied the trade-mark 'Wed-Lok' to finger rings and wedding ensembles and said finger rings and wedding ring ensembles were sold in interstate commerce over the entire United States by plaintiff continuously since at least the year 1936."

**Finding XI.**

"That plaintiff's trade-marked products, 'Wed-Lok' and the trade-mark 'Wed-Lok' have been widely and very extensively advertised throughout the United States from the year 1934 to the present, excluding the war years of 1942, 1943, 1944 and 1945; and such advertising, exclusive of extensive dealer advertising, cost approximately One Hundred Fifty Three Thousand Dollars (\$153,000.00)."



dealer' (R. p. 396). And more than three months earlier than that Granat had sent its first letters charging infringement (Dfts' Exs. 18, 19; R. pp. 297-300). Thus 'coming events (had already) cast their shadows before.' "

That this statement is absolutely false and utterly contrary to the record is established by Mr. Bloch's testimony (R. 400) which unequivocally states:

"A. \* \* \* *Most of the customers when I originally showed them the item*, I told them that if there was any question that we would back up—that the Feature Ring Co. would back them up.

Q. In other words, you anticipated that there would be trademark litigation?

A. Yes."

The utter futility of this statement in defendants' brief in attempting to minimize this tacit admission by defendant, Bloch, that he believed that concurrent use of "WED LOK" and "FEATURE LOCK" would cause confusion is established by simply correlating the above cited testimony with the previous testimony of Mr. Bloch, appearing at R. 387. At that point he testified that he first purchased "FEATURE LOCK" rings in January of 1948. Thus, he contacted his customers and prepared them for a complaint by Granat before Granat was aware of the infringement or had complained thereof *because the first notice of infringement was not sent out by plaintiff until April 9, 1948*. Thus, Bloch had been so advising his customers that a conflict was inevitable for months prior to any complaint by Granat and six months prior to the receipt of the letters from S. E. Needham for Bloch testified,

at R. 397, that the Needham letter was sent to him in late June.

Re: Distortion of plaintiff's act in circularizing its own customers.

On page 37 of defendants' brief *it charges that plaintiff circularized the industry* with a letter that they cleverly infer, although do not actually state, was a threat to defendant, Feature Ring Co., Inc.'s customers. *Actually this letter was sent only to plaintiff's own customers and was not a circularization of the jewelry industry.* The letter itself (Exhibit BB, R. 817)\* so establishes and Mr. Wineroth so testified at R. 181-182 where he said:

"Q. I show your letter which counsel referred to this morning as being sent as a circular letter dated August 13, 1948, and addressed to our customers, signed 'Granat Manufacturing Co.' Can you identify that letter?

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\* "Granat Manufacturing Company  
114 Geary Street, San Francisco 8, California  
August 13, 1948

To Our Customers:

You are undoubtedly aware that there are now being marketed several types of ring sets with names that are confusingly like Wed-Lok. Since you are a Wed-Lok dealer and one of our customers, we want you to know that where these rings are infringements on Wed-Lok rings patents and trade-marks, we are taking and will continue to take the necessary legal steps which cases of this kind justify.

You will be interested to know that suit has been brought by Granat Bros. against S. H. Friend, San Francisco wholesaler and Herbert Brown, Salinas, California retailer, alleging that the trade name 'Feature Lock' infringes the Granat Bros. trade-mark, Wed-Lok. Suit has also been brought by Granat Bros. against Kay Jewelry Co., in Los Angeles, alleging that the trade name, 'Tru-Lock' infringes the Granat Bros. trademark Wed-Lok.

You may be sure that everything that is legally proper is being done to protect you as a Wed-Lok dealer from unfair competition.

Cordially yours,

"Granat Manufacturing Company"



A. Yes, this is the letter that was sent to our customers.

Q. Would you tell us, please, if they were sent to your customers as of your books at that time or a portion of them, or just in any abandon?

A. Oh, no, they were taken from our records, our books of customers who have bought our Wed Lok rings.

Q. Do you know the reason it was necessary that letter be written?

A. It seems to me at the time there was confusion on this thing.

Mr. Naylor. I didn't get your answer.

A. There seemed to be some confusion and our salesmen were writing in asking us what we were doing—their customers or our customers wanted to know from them what we were doing about the ads that were appearing—we speak of the Feature Lock ads that were appearing, and these customers wanted to know what we were going to do about them, and they asked our salesmen what we were going to do about that, and we thought the best way to handle it in one fell swoop was to write them a letter, even those that did not inquire, and let them know just how we felt about the matter.”

Plaintiff, by this letter *to its own customers*, was merely attempting to answer the numerous inquiries directed to it by its customers with respect to what it was doing to stop the wanton infringement of the defendant, Feature Ring Co., Inc., and Feature Ring Co., Inc.'s various distributors and customers. There is full and sufficient evidence to sustain the District Court's Conclusion VIII (R. 42) (Case No. 12407):

“That the plaintiff has not unfairly competed with the defendant, Feature Ring Co., Inc.,” and Conclusion IX (R. 19) (in Case No. 12408): “That plaintiff has not unfairly competed with defendant, Feature Ring Co., Inc., and Herbert Brown.”

These particular points above discussed are only the most flagrant instances where defendants have attempted to misquote, misinterpret and misinform this Court as to the record facts of the instant litigation. Many more discrepancies are found in the brief, but space does not permit the discussion of all of the “errors” contained in defendants’ brief.

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**PLAINTIFF'S TRADE-MARK “WED LOK” IS A  
VALID TRADE-MARK.**

Contrary to defendants’ contention and as affirmatively found by the District Court plaintiff’s trade-mark is valid. The finding of the District Court in this respect is Finding VIII and states (R. 39:12407):

“Plaintiff’s trade-mark ‘Wed-Lok’ is not primarily descriptive of the ring ensembles marketed and sold by plaintiff, but it is used in a suggestive or figurative sense and is a valid registered trade-mark.”

and Conclusion II (R. 41) which is based upon said Finding VIII wherein the District Court concluded:

“That the trade-mark ‘Wed-Lok’ is a distinctive and valid trade-mark.”

Both Finding VIII and Conclusion II are amply supported by the evidence and are based upon these uncontroverted facts:

1. Early adoption by plaintiff in 1934 of the trade-mark "WED LOK". (R. 91) (Finding V R. 39)

2. Continued and widespread use of the trade-mark "WED LOK" since 1936. (R. 167) (Finding X R. 39)

3. That the trade-mark "WED LOK" is suggestive and is used in a figurative sense. (Finding VIII) (Conclusion II)

4. That the plaintiff is engaged in the manufacture of finger rings and not "locks". (R. 88-89)

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**PLAINTIFF'S TRADE-MARK, IN ADDITION TO BEING A VALID TECHNICAL TRADE-MARK, HAS ACQUIRED A SECONDARY MEANING.**

A secondary meaning attaches to a trade-mark by long, continued, widespread and exclusive use in commerce. The record discloses:

1. That plaintiff adopted its trade-mark "WED LOK" in 1934 and has had continuous and exclusive use of said trade-mark from 1936 to a period immediately preceding the filing of the complaint herein. (R. 204-205) (Findings IX and X)

2. Plaintiff's trade-marked products "WED LOK" from 1934 to 1941 were sold to six hun-

dred and fifteen (615) dealers in two hundred and twelve (212) towns located in thirty-seven (37) states and the Territory of Hawaii. (R. 172) (Exhibit Z R. 731)

3. Plaintiff's trade-marked products "WED LOK" as of 1947 were sold to one thousand and sixty-nine (1069) dealers in six hundred and two (602) towns located in forty-seven (47) states and the Territory of Hawaii and Washington, D. C. (R. 181) (Exhibit AA R. 762)

4. Plaintiff's trade-marked products "WED LOK" have been marked by having the said trade-mark "WED LOK" stamped on the inside of the rings. (R. 159)

5. Plaintiff's trade-marked products "WED LOK" have been extensively advertised throughout the United States. (See Exhibits DD, EE, FF and GG and Court's specific Finding XI, R. 40)

6. Plaintiff has expended in advertising its trade-mark "WED LOK" over One Hundred Fifty Three Thousand Dollars (\$153,000.00). (R. 178-179, 183-186, 255-257; Finding XI, R. 40)

7. Since 1934 plaintiff has sold products trade-marked "WED LOK" of approximately Three Million Dollars (\$3,000,000.00). (R. 178-179; Finding X, R. 39)



It is submitted, therefore, that the evidence is full and complete to show widespread and exclusive use of plaintiff's trade-marked products "WED LOK", and the ruling of the District Court that no secondary meaning has been established is clearly erroneous and contrary to the evidence and is entirely unsupported by the facts of this case as established by the evidence above set forth. A full discussion of the law of secondary meaning and its application to the instant case is found in Appendix A hereto.

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**DEFENDANTS HAVE INFRINGED PLAINTIFF'S TRADE-MARK  
BY USE OF THE TRADE-MARK "FEATURE LOCK" ON  
FINGER RINGS.**

Defendants have in their brief failed to satisfactorily answer and overcome the fact of trade-mark infringement by their use of the trade-mark "FEATURE LOCK", and the Court is respectfully referred to the argument and law presented at pages 21 to 45 of its opening brief.

Defendants, in discussing non-infringement in their brief, sarcastically charge plaintiff's witnesses with being "Charlie McCarthys". We believe such sarcasm to be out of place. Plaintiff's witnesses that established confusion in the trade were substantial and representative jewelers throughout the United States and had been engaged in the jewelry business for many, many years. Said witnesses testified on the initial entry of "FEATURE LOCK" rings into the jewelry field,

and further testified to the long knowledge of plaintiff's trade-mark "WED LOK".

When it is remembered that the defendant, Feature Ring Co., Inc., knew of plaintiff's trade-mark "WED LOK" when it adopted its mark "FEATURE LOCK" for the identical products (R. 352), it goes far to establish the fact of trade-mark infringement. Such action on behalf of defendant recalls the following statement of Judge Garrecht in the *Stork Restaurant* case (166 Fed. (2d) 348, 361) where he said:

" 'In *Florence Mfg. Co. v. J. C. Dowd & Co.*, supra, 2 Cir., 178 F. at page 75, we find a classical statement of the principle: "It is so easy for the honest business man who wishes to sell his goods upon their merits, to select from the entire material universe, which is before him, symbols, marks and coverings which by no possibility can cause confusion between his goods and those of competitors, that the courts look with suspicion upon one who, in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them." ' "

It should also be noted that in a large percentage of Granat Bros. dealer advertising (to the public) the trade-mark "WED LOK" is identified with Granat Bros. which identifies the source of "WED LOK" rings. This is in contradistinction with the practice of the defendant, Feature Ring Co., Inc., wherein in its dealer advertisements (to the public) no mention is made of the source of the product sold under the trade-mark "FEATURE LOCK".



There is attached hereto appendix B which discusses the leading cases with respect to trade-mark infringement and also lists trade-marks that have been held to be confusingly similar to each other, all of which clearly indicate that the two trade-marks, "WED LOK" and "FEATURE LOCK", are confusingly similar. The Court's attention is respectfully directed to said appendix B.

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### CONCLUSION.

We respectfully submit that this Court find:

1. That plaintiff's trade-mark "WED LOK" is a distinctive and valid trade-mark.
2. That plaintiff's trade-mark "WED LOK", by its exclusive, extensive and long use, has acquired a secondary meaning.
3. That the trade-mark "FEATURE LOCK" used in connection with wedding ring ensembles is confusingly similar to plaintiff's trade-mark "WED LOK".
4. That there has been "confusion of source" respecting defendants' products in the customers of the wholesale business conducted by plaintiff.
5. That the result of the use of the trade-mark "FEATURE LOCK", and similar composite marks on defendants' products, has been a dilution, diminishing and lessening of the good will of the plaintiff, as represented by its trade-mark "WED LOK", and its investment in the sales and advertising thereof.

6. That defendants, and each of them, by the use of the trade-mark "FEATURE LOCK" upon wedding ring ensembles have infringed upon plaintiff's trade-mark rights and have unfairly competed with plaintiff.

Dated, San Francisco, California,  
July 12, 1950.

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(Appendices A and B Follow.)





## Appendix A

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EVEN ASSUMING THAT THE TRADE-MARK "WED LOK" TO SOME EXTENT IS DESCRIPTIVE OF THE CHARACTER OF THE GOODS PLAINTIFF HAS PROVED A SECONDARY MEANING IN ACCORDANCE WITH THE AUTHORITIES BY A FAIR PREPONDERANCE OF THE EVIDENCE.

Secondary meaning may be presumed to exist where a name has been used so long and so extensively and exclusively that association with the product would naturally result. Obviously, secondary meaning is one of the most difficult kinds of evidence to procure, but direct evidence of what exists in the mind of the public is not required.

Judge Holmes, speaking for the Massachusetts court in *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 46 N.E. 386, stated:

"The report states that it did not appear whether or not any purchaser of awls had learned to recognize the plaintiff's awls by the appearance of the packages. This cannot mean more than that there was no direct testimony to that effect. But the fact that the plaintiff had used the combination since 1885, and largely since 1893, is enough to raise a presumption in its favor."

Likewise, in the *Standard Oil* case with respect to the trade-mark "Standard" (*Standard Oil Company v. Michie*, 34 Fed. (2d) 802), it was held that more than thirty years' use of the word "Standard" had caused that word to be lifted from the public domain, and at least to fall in the twilight zone, as between evidence of the fact and judicial notice of the fact.

Where the only evidence of secondary meaning consists of proof of the length, extent and manner of use, all of these elements may be considered and have been held by the courts to be sufficient evidence of secondary meaning. In the following cases the evidence was held sufficient to prove secondary meaning:

*Wisconsin Electric Co. v. Dumore Co.*, 35 Fed.

(2d) 555, 557-558 (C.C.A. 6, 1929), 3 PQ 232.

"Dumore" was granted protection as a secondary meaning mark.

"Plaintiff has used it as a trade-mark since its organization in 1913. It has placed it on all its products, except on such of its small motors as it sold to other manufacturers. Plaintiff's gross business in the fourteen years of its existence has been more than \$5,000,000. During the year 1926 it amounted to \$1,132,000. About 65 per cent of this represented products to which the word 'Dumore' was applied. These products had acquired an enviable reputation for superior excellence and quality. \* \* \* It advertises extensively in magazines and trade journals. For this advertising it has expended in the last few years more than \$35,000 annually. The word 'Dumore' is always displayed in bold type in these advertisements. Their products are generally known in the trade as 'Dumore' products, and are advertised and called for as such by the retail trade."

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*Shaler Co. v. Rite-Way Products, Inc.*, 107

Fed. (2d) 82, 84 (C.C.A. 6, 1939), 43 PQ 425.

"There was evidence and the court below found, that for many years the appellant had used the



words 'Hot Patches' extensively in connection with its merchandise; had spent large sums of money putting its product on the market; had established a nation-wide field of activity, accumulating numerous dealers in its products, and had introduced feature advertising stressing the words 'Hot Patches.' "

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*Miles Shoes v. Niles Bootery*, 235 App. Div. 575, 257 NYS 790 (1932), 22 TM Rep. 407.

Use of a personal name for approximately eight years, and extensive advertising, established its secondary meaning.

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*Van Camp Sea Food Co., Inc. v. Packman Bros.*, 4 F. Supp. 522, 524 (D. C. D. N. J. 1933), 19 PQ 37.

Twenty years' use of the words "Chicken of the Sea" on canned tuna fish by the concern which made "the first use of the phrase in a manner to entitle anyone to its exclusive use" was sufficient evidence of secondary meaning.

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*General Shoe Corporation v. Rosen*, 111 Fed. (2d) 95, 99 (C.C.A. 4, 1940), 45 PQ 196.

Extensive advertising and large sales during a period of more than fifteen years proved that the term "Friendly" had acquired secondary meaning.

To say the least, the sales distribution of "WED LOK" over the last fourteen (14) years throughout the entire United States, and in practically every city and hamlet thereof, as discussed in a previous chapter, plus the wide and extensive advertising of "WED LOK" over the same territory during the years, as also discussed in a previous paragraph, coupled with the testimony of the witnesses,\* including the defendant Block, plus the completely exclusive use of the name "WED LOK" or anything confusingly similar thereto by Granat Bros. during the past fourteen (14) years, certainly presents a strong, if not a stronger case to prove secondary meaning in this peculiar field than the facts of the above cases.

We also call attention to the fact that retail customers asked the witnesses Jacoby (Defendants' Exhibit JJJ, R. 33), Jackson (Defendants' Exhibit KKK, R. 11), Goldblatt (Defendants' Exhibit LLL, R. 14), Kleiger (Defendants' Exhibit MMM, R. 21-22), Van Sipma (Defendants' Exhibit OOO, R. 25), Shapiro (Defendants' Exhibit RRR, R. 25, 33), Gamler (Defendants' Exhibit QQQ, R. 15-16), Navarro (Defendants' Exhibit NNN, R. 25), and Kernis (Defendants' Exhibit PPP, R. 34), for "WED LOK" by its trade-mark name.

The above matter is the only practical way of proving secondary meaning in this particular case, because usually one retail customer purchases but one wedding ring ensemble. We urge that it has been proved

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\*Deposition witnesses Jacoby, Jackson, Goldblatt, Kleiger, Navarro, Van Sipma, Kernis, Gamler and Shapiro.

in accordance with the above authorities by a fair preponderance of the evidence.

Although we believe "WED LOK" is a valid technical trade-mark, plaintiff is entitled to relief regardless of whether it is a valid technical trade-mark or not.

63 *Corpus Juris*, Section 101, pages 391, 392.

"An exclusive proprietary interest such as a trade-mark or copyright, in the terms or symbols used to palm off the goods of one manufacturer or vendor as those of another, is not essential to the maintenance of a suit to enjoin or redress the perpetration of the wrong \* \* \*. *Relief will be afforded regardless of whether or not the deceptive words or marks are valid technical trade-marks.* The cases are very numerous where relief has been afforded upon the ground of unfair competition against a deceptive use of generic or descriptive names and marks, personal geographical, corporate, and other names, *none of which are capable of exclusive appropriation as technical trade-marks.*"

Our Circuit Court of Appeals for the Ninth Circuit so ruled in *Stork Restaurant v. Sahati*, 166 Fed. (2d) 348, and they quoted the following rule with approval:

"It is asserted by defendants that an absolute injunction will not be granted for the infringement of the right to use a word in what is called a 'secondary meaning' as distinguished from a technical trademark. Where words have acquired, as is established beyond dispute in this case, a fanciful meaning—a meaning that has no connection with their common meaning, it may be

more properly said that such meaning is their primary meaning in so far as their use in business is concerned. Their common meaning has dropped into the background. Otherwise no right to use them to the exclusion of others would have been acquired. *When, however, words have acquired such a sense and are the subject of the good will and reputation of a business which they designate, there is little if anything left to distinguish them from a trademark, a symbol, characters or words which have no common meaning and which are artificial, insofar as the scope of protection afforded to the one who has the prior right.*"

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*Straus v. Notaseme Hosiery Company*, 36 S. Ct. 288, 289 (240 U.S. 179).

Plaintiff used "Notaseme", with rectangle containing black band running from left hand upper to right hand lower corner, the upper and lower panels on the two sides of the band being printed in red. "Notaseme" refused registration as trade-mark. Defendant used "Irontex" with practically same color and stripe combination.

Plaintiff sold seamless hosiery while defendant sold hose with seams.

"At the original hearing in the circuit court it was held that the plaintiff had embodied such a misrepresentation in the trademark as used that it would not be protected, and that unfair dealing was not made out. This decision was reversed by the circuit court of appeals on the ground that although the evidence did not show actual decep-



tion, the label used by the defendants so far resembled the plaintiff's that it would have deception as its natural result, and that the *plaintiff was entitled to relief whether the trademark on its label was good or bad as such.* 119 C.C.A. 134, 201 Fed. 99. The plaintiff was allowed to recover profits from a reasonable time after the defendants had notice of the similarity of the two designs, which was put at January 1, 1910. 209 Fed. 495, 131 C.C.A. 503, 215 Fed. 361.

*"We agree with the circuit court that the plaintiff is not in a position to recover for an infringement of a registered trademark. The mark that it used held out to the public as registered in the Patent Office precisely the element that had been rejected there. It affirmed that the authority of the United States had sanctioned that for which that authority had been refused, and by grasping at too much lost all, so far as this case is concerned. Halzapfel's Compositions Co. v. Rathjen's American Composition Co., 183 U.S. 1, 8, 46 L. ed. 49, 53, 22 Sup. Ct. Rep. 6. The liability of the defendant must be derived from unfair competition if it exists.*

*"That it was unfair to continue the use of a label so similar in general character to the plaintiff's we are not disposed to deny."*

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*Furniture Hospital v. Dorfman*, 133 S.W. 861, 862 (K.C. Ct. of Appeals).

Suit to enjoin defendant from use of name "New York Furniture Hospital". Decision of lower Court sustaining demurrer reversed:

“There is no claim on the part of plaintiff that there has been a violation of a technical trademark, but that under the circumstances plaintiff has a right to designate his business by the name ‘Furniture Hospital’, and that defendant has no right to give his business such a similar designation as will enable him to deceive and mislead the public into thinking they are dealing with plaintiff. In other words, plaintiff claims that defendant is violating the rule against unfair competition which consists in passing off, or attempting to pass off, the goods *or business* of one person as and for the goods *or business* of another. In such case no exclusive proprietary interest in the trade name is necessary to relief, while in trademark cases an exclusive right is necessary, and this seems to be the principal distinction between the two. 38 Cyc. 763.

“Trade names are divided into exclusive and non-exclusive trade names. The former are protected upon the same principles that trade-marks are non-exclusive trade names, are such names as are *publici juris*; that is open to or exercisable by all persons in their primary sense, but which in a secondary sense have come to indicate the business of a particular trader. 38 Cyc. 765. The name which plaintiff in this case seeks to protect is that of a non-exclusive trade name in its secondary meaning.”

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*Weiner v. National Tinsel Mfg. Co.*, 123 F. (2d) 96, 98 (C.C.A. 7).

Appeal from an order granting a preliminary injunction enjoining defendant from using “Tye-Ad-



String", "Ribbontye", any simulation of names "Print-Ad-String" and "Ribbonette" on similar goods. The defendant contended that the marks were descriptive and therefore invalid and in that connection the Court said:

"Plaintiff's trade names having acquired a secondary meaning, their validity as registered trade-marks is immaterial to the instant question. Under such a situation, they have a common law right which they are entitled to have protected. In referring to the secondary-meaning doctrine, the court in *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 335, 59 S. Ct. 191, 201, 83 L. Ed. 195, said:

" 'This establishes, entirely apart from any trade-mark act, the common law right of the Nu-Enamel Corporation to be free from the competitive use of these words as a trade-mark or trade name.' "

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*Western Auto Supply Co. v. Knox*, 93 F. (2d) 850, 852 (C.C.A. 10).

"Confined to their primary meaning, geographical words and words which are merely descriptive of the merchandise are not capable of exclusive appropriation. But, where words of that character have been used so long and so exclusively by a trader or distributor with reference to his merchandise that they are generally understood to mean and denote such merchandise, they acquire a secondary meaning quite apart from their primary significance and he may restrain their perfidious use by another if it causes deceit and injures his business."

*Landers, Frary & Clark v. Universal Cooler Corp.*, 85 F. (2d) 46, 48 (C.C.A. 2).

Suit to enjoin defendant from use of word "Universal" on electric refrigerators: plaintiff selling cabinets for same articles under name of "Universal Cooler".

"The suggestion has at times also been made that the doctrine does not apply to a mark which is not coined, and it is on this that the defendant apparently relies. (Citing cases.) We do not agree; so far as *France v. Washburn-Crosby Co.*, *supra*, says anything to the contrary, it was obiter. It is quite true that, just as a coined word is easier to protect than a word of common speech upon goods on which the owner has used it, so it is easier to prevent its use upon other kinds of goods. The proprietary connotation,—'secondary meaning',—of a word of common speech is harder to create and easier to lose, and its fringe or penumbra does not usually extend so far as that of a coined word. But that is matter of proof and of that alone; if the owner can in fact show that the fringe does extend to other goods there is no reason why his interest should not be recognized. His interest is exactly the same as though the mark were a coined word (his reputation and his chance to extend his sales); and while the plagiarist has a better excuse because the law recognizes that all have an interest in the free use of the language, the conflict is between the same interests as when the owner seeks to protect the name upon goods which he has sold. It would therefore be wrong to make any absolute distinction between coined, and colloquial, names."

*Standard Oil Co. v. Michie*, 34 F. (2d) 802, 803-804 (D.C., E.D. Missouri).

“There was much evidence that the name ‘Standard’, or that word when used in connection with the gasoline and lubricating oils business, has been lifted from the public domain and has taken on a secondary meaning, as wholly applicable to plaintiff and its business, and that the word ‘Standard’ is generally understood, in such business, as referring to plaintiff’s goods.” (*Italics Court’s.*)

\* \* \* \* \*

“If plaintiff by more than 30 years’ use of the word ‘Standard’ has caused this word to be lifted from the public domain, and to be applied and understood in the oil business as designating its business, and its gasoline and oils, then no one has the right to use this word in such wise as to cause confusion among customers. Not only does the proof show such lifting of the word ‘Standard’ from the public domain, but the situation is such as at least to fall in the twilight zone, as between evidence of the fact and judicial notice of the fact.”

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*George La Monte & Son v. Quayle & Son Corporation, et al.*, 33 Fed. Supp. 481 (D.C., N.D. New York).

Suit for trade-mark and unfair competition. Plaintiff is owner of trade-mark “Safety Check” for use on safety paper. The defendant is also manufacturer and seller of paper using identical name. The defendant moved to dismiss on the ground that “Safety Check” is a mere descriptive term and is not a valid

trade-mark. In denying defendant's motion to dismiss, the Court said:

"The defendants cite numerous decisions holding that words merely descriptive of characteristics of the product are not the subject of the trade-mark and cannot become the subject of a monopoly by any manufacturer of such goods. In other words, that no mere descriptive term can be a valid trade-mark.

"If this were merely a suit for infringement of trade-mark, the defendant's position would be strong.

"But this is also a suit for unfair competition and the weight of authority is that if such descriptive words, though not constituting a valid trade-mark, have been used so long, so extensively and so exclusively by a manufacturer who has used these words as a supposed trade-mark as to identify such words with his product and thereby indicate the origin of the goods, in such case the words acquire a secondary meaning and will support an action for unfair competition against one or more competitors who fraudulently use the same or like words to deceive the public into believing his or their goods are the goods long made by the manufacturer using the words as claimed trade-mark."

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*Hudson Tire Co., Inc. v. Hudson Tire & Rubber Corporation, et al.*, 276 Fed. 59, 60-61 (D.C. S.D. New York).

Defendant enjoined from using word "Hudson" on tires.



“I think the word ‘Hudson’, as applied to tires and cords, had obtained a secondary meaning referable to complainant’s merchandise, and the fact that defendants had secured a corporate name from the state of New York did not authorize them to use it in connection with such merchandise.”

*Holeproof Hosiery Co. v. Wallach Bros.*, 172 Fed. 859, 860 (C.C.A. 2).

Defendant enjoined from use of word “Holeproof” on stockings.

“Nor do we find any particular force in the objection that the word is descriptive. The record, as it now stands, sufficiently indicates that by expensive advertising, and large sales during several years the word ‘Holeproof’ has acquired a secondary meaning, indicating to the prospective purchaser, not that socks sold under it are indestructible, but that they are those which complainant has been making and supply to consumers, apparently to their entire satisfaction.”

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*New York World’s Fair 1939 v. World’s Fair News*, 297 N.Y.S. 923.

Plaintiff was organized to plan and operate World’s Fair, having its own publication World’s Fair Bulletin. Defendant was the publisher of a magazine under its own name as above. Defendant enjoined from use of words “World’s Fair”.

“The defendants contend that the words ‘World’s Fair’ are generic or descriptive words



which any person may use. The well established rule is, however, that such words or names may acquire a secondary meaning entitling them to protection.”

If plaintiff proves that the name or word has been so exclusively identified with his goods or business as to have acquired a secondary meaning so as to indicate his goods or business, and his alone, he is entitled to relief against another's use of such mark in a trade-mark sense.

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*Le Blume Import Co., Inc. v. Coty, et al.*  
(C.C.A. 2, 1923), 293 Fed. 344.

“For it is entirely clear that, if a word which in its primary sense is descriptive has nevertheless been used so long or so exclusively in a particular market by a particular dealer that his product in that market and to its purchasing public has come to mean that the article in connection with which the word is used is the product of a particular producer, it acquires a secondary meaning, which is indicative of the manufacturer and the excellence of the thing produced, and enables the manufacturer to assert an exclusive right in the word. Nims on Unfair Competition and Trade-Marks (2d Ed.) § 37.”

Words which have a primary meaning of their own, such as words descriptive of the goods or a quality or character of the goods, which were not capable of exclusive appropriation as a trade-mark originally

or at the time of its adoption, may nevertheless by long use in connection with the goods or business of a particular trader come to be understood by the public as designating the goods or business of that particular trader. Such a word has a secondary meaning and it may not be used in a trade-mark sense by a competitor.

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*G. & C. Merriam Co. v. Saalfeld* (C.C.A. 6, 1912), 198 Fed. 369.

“\* \* \* It contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trade-mark. \* \* \*”

See also:

*Coca-Cola Co. v. Koke Co.*, 254 U.S. 143, 41 S. Ct. 113;

*American Lead Pencil Co. v. L. Gottlieb & Sons* (C.C. S.D. N.Y.), 181 Fed. 178;

*Pinaud, Inc. v. Huebschman* (D.C. N.Y.), 27 Fed. (2d) 531 (affirmed 27 Fed. (2d) 538).

## Appendix B

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IN ORDER TO CONSTITUTE TRADE-MARK INFRINGEMENT THE COURTS HAVE HELD IT IS NOT NECESSARY THAT THE TRADE-MARK BE LITERALLY COPIED OR THAT BOTH WORDS OF A COMBINATION TRADE-MARK BE USED. SIMILARITY IS SUFFICIENT IF THE SIMILARITY IS SUCH AS MIGHT CAUSE CONFUSION IN THE TRADE.

The Courts, including our Court of Appeals, have frequently held composite trade-marks to be infringed where but one part of the conflicting marks is similar and that part is a word found in the dictionary, and in some instances suggestive of the characteristic of the product.

There are three relatively recent cases (the last in 1941), by three different District Courts (California, Michigan and Missouri) of the United States directly in point with the case at bar, which involve the same composite trade-mark "Miracle Whip". This mark seems more suggestive of a characteristic of mayonnaise than the word "WED LOK" is suggestive of the characteristic of a wedding ring ensemble. In one of those cases the District Court found as a fact that manufacturers had described the whipped salad dressing previously as being a "whipped" product.

In these three cases, the first held that "Wonder Whip" was confusingly similar to "Miracle Whip" (*Kraft-Phenix Cheese Corporation v. Goldfarb, et al.* (D.C. Calif.), 7 F. Supp. 199).

In the second case, which was in Michigan, "Wonder Mix" was held confusingly similar to "Miracle

Whip" (*Kraft-Phoenix Cheese Corp. v. R. E. Robertson, Inc.* (D.C. Mich), 9 F. Supp. 125).

In the third case "Salad Whip" was held confusingly similar to "Miracle Whip" (*Kraft Cheese Co. v. Leston Co.*, 43 F. Supp. 782 (1941)).

We submit that the above three cases and the facts thereof are parallel to the case at bar.

Also directly in point are the "Celotex" cases:

"Fir-Tex" confusingly similar to "Celotex":

*Celotex Co. v. Millington*, 49 Fed. (2d) 1053.

"Flametex" confusingly similar to "Celotex":

*Celotex Co. v. Bronston Bros. & Co.*, 49 Fed. (2d) 1048.

"Opal-Tex" confusingly similar to "Celotex":

*Celotex Co. v. Chicago Panel-Stone Co.*, 49 Fed. (2d) 1051.

This Court, in the case of *N. K. Fairbank Co. v. Luckel, King & Cake Soap Co.*, 102 Fed. 327 (C.C.A. 9, May 7, 1900), held that the trade-mark "Gold Dust" was infringed by the name "Gold Drop", despite the fact that entire dissimilar labels were adopted by the infringer. In discussing the question of infringement, the Court said:

"This is a suit in equity. It was instituted to restrain the infringement of the trade-mark or trade-name 'Gold Dust', used to designate a washing powder manufactured and sold on the market by appellant. The alleged infringement consists of the use of the name 'Gold Drop' to designate a washing powder manufactured and sold by appellee. \* \* \*



“The testimony shows that respondent at the time it commenced the manufacture of its washing powder ‘Gold Drop’ was well aware of the existence of complainant’s ‘Gold Dust’, and that it had been extensively and expensively advertised in Oregon as well as in other states; \* \* \*

“The law is well settled that in suits of this character the intention of the respondent in adopting the style of package, or choosing a name for a similar product, is to a certain extent immaterial. It is not essential to the right of complainant to an injunction to show absolute fraud or willful intent on the part of the respondent. Upon familiar principles, it will be presumed that the respondent contemplated the natural consequences of its own acts. If the acts of respondent in the adoption of the name ‘Gold Drop’ constituted an infringement of the trade-mark or trade-name of the complainant, and it was put on the market in such a manner as to interfere with the legal rights of complainant, to its loss and injury, it would be entitled to an injunction, irrespective of the question of any testimony as to actual fraud or willful intent. The Court must determine the intent from respondent’s acts and the results produced thereby. *R. Henisch & Sons v. Boker* (C.C.), 86 Fed. 766, 769.

“\* \* \* It must constantly be borne in mind that there are two kinds of trade-marks—one of peculiar pictures, labels, or symbols; the other in the use of a name. The infringement charged herein is in the adoption by the respondent of both the trade-name and trade-mark. So far as the name ‘Gold Dust’ is concerned, the dissimi-



larity of the labels, size of packages, and character of symbols can make no essential difference. As was said in *Hier v. Abrahams*, 82 N. Y. 519, 525:

“ ‘The trade-mark consisted in the word simply, and the plaintiffs might have printed it on any form of label they might fancy, without losing the protection of the law. The defendants had no right to adopt it by merely putting it on a label of different fashion from that which the plaintiffs had been in the habit of using.’ ”

\* \* \* \* \*

“ ‘The trade-name differs from the trade-mark in this: that one appeals to the ear more than to the eye. The advertisements of the name were for the purpose of having the intended purchaser ask for ‘Gold Dust’ without his having any knowledge of the character of the label on the package he was to receive, and in this sense the fact that the infringer of the name used different devices and symbols would have no great force. The imitation of the name ‘Gold Dust’, by which the soap or washing powder of complainant was known, would constitute an infringement, because purchasers would be liable to be misled who had no knowledge of the article except the advertised name as being the best soap or washing powder in the market. It is not unusual for a certain specific article advertised extensively, of reputed excellence, to become publicly known and called for by the name which is more readily retained in the memory. This is one of the reasons why respondent selected the name ‘Gold Drop’,—‘on account of its being short; good for advertising, and easy to remember.’ ”

Other decisions of like import are as follows:

“Rugfoam” confusingly similar to “Fabrikfoam”:

*Ex parte West Disinfecting Company*, 64 U.S.  
P.Q. 489.

“Black and Tan” confusingly similar to “Black and White”:

*Harris v. Plough Chemical Co.*, 54 Fed. (2d)  
967.

“Brest O’Chicken” confusingly similar to “Chicken of the Sea”:

*Van Camp Sea Food Co. v. Westgate Sea Products Co.*, 48 Fed. (2d) 950.

“Butter-Cream” confusingly similar to “Butter-Nut” and “Butter-Krust”:

*Nafziger v. Schulze Baking Co.*, 46 App. D.C.  
292.

“Canned Light” confusingly similar to “Barreled Sunlight”:

*Boydell Bros. White Lead & Color Co. v. U. S. Gutta Percha Paint Co.*, 57 App. D.C. 308,  
22 Fed. (2d) 1006.

“Chero-Cola” confusingly similar to “Coca-Cola”:

*Coca-Cola Co. v. Chero-Cola Co.*, 511 App. D.C.  
27, 273 Fed. 755.

“Coal-O-Matic” confusingly similar to “Oil-O-Matic”:

*Cross v. Williams Oil-O-Matic Heating Corporation*, 48 Fed. (2d) 659.

“Dainty Maid” confusingly similar to “Lady Dainty”:

*McLellan Stores Co. v. Conrad & Co.*, 57 App. D.C. 176, 18 Fed. (2d) 826.

“Dri-Shod” confusingly similar to “Dry-Socks”:

*F. P. Kirkendall & Co. v. Mayer Boot & Shoe Co.*, 47 App. D.C. 245.

“Foot Preserver” confusingly similar to “Arch Preserver”:

*Trustees for Arch Preserver Shoe Patents v. James McCreery & Co.*, 49 Fed. (2d) 1068.

“Lemon Frost” confusingly similar to “Jack Frost”:

*In re Coca-Cola Bottling Co. of Los Angeles*, 49 Fed. (2d) 838.

“Permanize” confusingly similar to “Simoniz”:

*Simoniz Co. v. Permanizing Stations of America*, 49 Fed. (2d) 846.

“Peroxogen” confusingly similar to “Dioxogen”:

*Bookman v. Oakland Chemical Co.*, 40 Fed. (2d) 1006.

“Property Life Insurance” confusingly similar to “Surface Insurance Policy Products”:

*Baltimore Paint & Color Works v. Bennett Glass & Paint Co.*, 40 Fed. (2d) 1009.

“Public Safety Bond” confusingly similar to “Public Service Bond”:

*Harlem-Card & Paper Co. v. Taylor-Loan Co., Papermakers*, 56 App. D.C. 149, 10 Fed. (2d) 1014.

“Ray-O-Lite” confusingly similar to “Prest-O-Lite”:

*French Battery & Carbon Co. v. Prest-O-Lite Co.*, 49 App. D.C. 373, 265 Fed. 1013.

“Redleaf” confusingly similar to “Redfern”:

*John Wanamaker, Philadelphia v. Warner Bros. Co.*, 59 App. D.C. 284, 29 Fed. (2d) 872.

“Rocklath” confusingly similar to “Locklath”:

*U. S. Gypsum Co. v. Plastoid Products*, 46 Fed. (2d) 580.

“Seal-O-Meter” confusingly similar to “Mail-O-Meter”:

*International Postal Supply Co. v. Pitney-Bowes Postage Meter Co.*, 38 Fed. (2d) 692.

“Suncrush” confusingly similar to “Orange Crush” and “Lemon Crush”:

*Orange Crush Co. v. California Crushed Fruit Co.*, 54 App. D.C. 313, 297 Fed. 892.

“Velvetina” confusingly similar to “Velvelite”:

*Goodrich Drug Co. v. Cassada Mfg. Co.*, 46 App. D.C. 146.

“Wheat-Nut” confusingly similar to “Grape-Nuts”:

*Postum Cereal Co. v. Farmers’ Mill & Elevator Ass’n*, 58 App. D.C. 73, 24 Fed. (2d) 901.

“White Chicken” confusingly similar to “Chicken of the Sea”:

*Van Camp Sea Food Co. v. Alexander B. Stewart Organizations*, 50 Fed. (2d) 976.

“White Lily” confusingly similar to “Lily White”:  
*R. H. Macy & Co. v. New York Grocery Co.*,  
 50 App. D.C. 105, 267 Fed. 749.

“White Magic” confusingly similar to “Magic Marvel”:  
*Broderick v. L. Mitchell & Co.*, 53 App. D.C.  
 220, 289 Fed. 618.

“Edelweiss-Maltine” confusingly similar to “Maltine”:  
*Peter Schoenhofen Brewing Co. v. Maltine Co.*,  
 30 App. D.C. 346.

“Chancellor Club” confusingly similar to “Club Cocktails”:  
*In re S. C. Herbst Importing Co.*, 30 App. D.C.  
 297.

“Amber Bead” confusingly similar to “Amber”:  
*In re Independent Breweries Co.*, 39 App. D.C.  
 118.

“Ace of Clubs” confusingly similar to “Ace Hy”:  
*Miller Becker Co. v. King of Clubs*, 56 Fed.  
 (2d) 883.

Also in point are:

*American Lead Pencil Co. v. L. Gottlieb & Sons*, 181 Fed. 178 (C.C., S.D. N.Y., July 22, 1910).

“\* \* \* I have no difficulty in finding that the phrase ‘Knoxall’ is an infringement of the phrase ‘Beats-All’. There is no such limitation as the defendant puts upon the infringement of a trademark; i.e., that the similarity must go only to



the eye or ear. The question cannot be treated in any such technical manner, for always the substantial question is whether the defendant is likely to steal the complainant's trade by the use of the trade-mark in question. I am quite satisfied in this case that there is such similarity between the two phrases as would readily lead in the mind of customers to confusion; a case in point is the infringement of 'Keepclean' by 'Sta Kleen'. *Florence Manufacturing Company v. J. C. Dowd & Co. (C.C.A.)*, 178 Fed. 73. There are many other decisions in the books which show that it is not alone similarity to the ear or eye which constitutes infringement."

*Elliott Varnish Co. v. Sears, Roebuck & Co.*

221 Fed. 797 (D.C., N.D., Illinois, E. D.

March 26, 1915).

"This is a suit brought on a registered trade mark for 'Roof Leak'. \* \* \* Defendant, a mail order house in Chicago, Ill., is selling a roof paint under the name of 'Never Leak', and this is alleged to be an infringement.

\* \* \* \* \*

"I think the trade-mark is valid, under the cases cited in *Hopkins on Trade-Marks*, 90 among which the following have been sustained 'Cream', referring to baking powder; 'Snowflake', referring to crackers or bread; 'Ant Washboard', suggesting soap; 'Bacco Curo' and 'No To Bac'; 'Baffle', referring to safes; 'Balm of a Thousand Flowers', a cosmetic; 'Slate', roof paint; and 'Swandown', a face powder.

"'Never Leak' obviously suggests the same idea as 'Roof Leak', when applied to a paint, and I think it is an undoubted infringement."

In a case involving wedding rings, the mark "Diamond Blossom" was held confusingly similar to "Orange Blossom" (*Traub Mfg. Co. v. R. Harris & Co.*, 53 Fed. (2d) 416).

We therefore respectfully urge, under the facts of the case at bar, that the word "FEATURE LOCK", being used on identical goods after fourteen (14) years of exclusive use of the word "WED LOK" by plaintiff and with the obvious effect of diluting, diminishing and whittling away plaintiff's rights under such mark, constitutes an infringement thereof in complete accord with the above authorities.

